A **KUTHUBUL ZAMAN & ANOR**

v.

TJB DEVELOPMENT SDN BHD & ANOR

B COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF JCA
SULONG MATJERAIE JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: J-04-154-2008]
C 15 JULY 2009

CONTRACT: *Breach - Misrepresentation - Sale of property - Brochure - Oral representation - Brochure and oral representation indicating existence of second access road to property - Failure to build second access thereof - Whether defendant in breach of contract - Representation - Whether a 'warranty collateral to Sale and Purchase Agreement' - Damages*

D The plaintiffs had purchased two units of office space at a complex known as Menara TJB from the 1st defendant developer. The E plaintiffs alleged that the 1st defendant was guilty of breach of contract and misrepresentation when it failed to provide a second access road to the complex as orally represented to them and indicated in the brochure, and in the circumstances, claimed to recover their losses thereof. The 1st defendant denied to having F made any oral representation, and in any case pointed out that the brochure, which contained a disclaimer, was only an artist's impression of the complex and not an offer or a term of the contract. The argument notwithstanding, the Sessions Court allowed the plaintiffs' claim ruling that a representation had indeed been G made and relied upon by the plaintiffs. On appeal, the Sessions Court's decision was however overruled by the High Court. According to the High Court, the subordinate court had failed to judicially appreciate the case before it, having judged the plaintiffs' claim as one of contract under the relevant Sale and Purchase H Agreement, and not of the tort of negligent misrepresentation as pleaded. Dissatisfied, the plaintiffs appealed.

Held (allowing appeal; affirming order of the Sessions Court): Per Kang Hwee Gee JCA delivering the judgment of the court:

I **(1)** The plaintiff's pleading was most unsatisfactory in so far as it purports to set a claim on breach of contract. Nowhere was it pleaded in clear terms that the 1st defendant had committed a

breach of an essential term of the contract in failing to build the access road from Jalan Dato' Dalam. Nevertheless, considered in its entirety, and taking into consideration the reply, the pleading does disclose a cause of action in breach of contract with respect to the first defendant's failure to provide the access. The High Court was therefore wrong in allowing the 1st defendant's appeal on the sole ground that the plaintiff's claim was founded on the tort of negligent misrepresentation and not on breach of contract. (para 10)

(2) There was enough material for the Sessions Court to find that oral representation had indeed been made through the sales agent and staff of the 1st defendant to the plaintiffs that an access road from Jalan Dato' Dalam would be built to override the disclaimer on the brochure and that the plaintiffs had relied on this representation before they signed the Sale and Purchase Agreement. On the facts, the Sessions Court judge was perfectly entitled to conclude that the representation had induced the plaintiffs to enter into the Sale and Purchase Agreement. Such representation, on the principle alluded to by Salleh Abas FCJ in *Tan Chong & Sons Motor Co Sdn Bhd v. Alan Mcknight*, constitutes a warranty "external to the main contract", *ie*, a warranty collateral to the Sale and Purchase Agreement. (para 11)

(3) Although the plaintiffs' claim appeared to be inappropriately described as recovery of "overpayment", what the plaintiffs were claiming was for the loss arising from the difference in value between an office unit with the additional access road against one without the additional access road. In the absence of any other evidence emanating from the 1st defendant, the evidence of the registered valuer called by the plaintiffs assessing the difference in market value of the two units (with and without access road) at RM201,000 should be accepted as representing the loss incurred by the plaintiffs. (paras 12 & 13)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif-plaintif telah membeli dua unit ruang pejabat di kompleks yang dipanggil Menara TJB dari pemaju defendan pertama. Plaintif-plaintif mengatakan bahawa defendan pertama telah melakukan kemungkiran kontrak dan salah nyataan apabila gagal menyediakan jalan akses kedua ke kompleks tersebut sepertimana yang dijanjikan secara lisan kepada mereka dan disebut di dalam brocer, dan

berikutnya, telah menuntut gantirugi dari defendan pertama. Defendan pertama menyangkal telah membuat apa-apa representasi salah, dan walau apapun mengatakan bahawa brocer, yang mengandungi disclaimer, hanyalah merupakan pandangan seorang artis terhadap kompleks dan bukannya suatu tawaran atau terma kontrak. Namun begitu, tuntutan plaintif-plaintif telah dibenarkan oleh Mahkamah Sesyen yang memutuskan bahawa suatu representasi sememangnya ada dibuat dan dijadikan pergantungan oleh plaintif-plaintif. Di rayuan, keputusan Mahkamah Sesyen ini bagaimanapun telah diakas oleh Mahkamah Tinggi. Menurut Mahkamah Tinggi, mahkamah rendah, dengan mengadili kes plaintif-plaintif sebagai suatu kes kontrak dan bukannya sebagai perkara tort salah nyataan cuai, telah gagal menilai dengan penuh kehakiman kes yang ada di hadapannya. Tidak berpuas hati, plaintif-plaintif merayu.

Diputuskan (membenarkan rayuan; mengesahkan perintah-perintah Mahkamah Sesyen)
Oleh Kang Hwee Gee HMR menyampaikan penghakiman mahkamah:

(1) Pliding plaintif-plaintif adalah amat tidak memuaskan setakat percubaannya untuk membangkitkan suatu kes berdasarkan kontrak. Tidak dinyatakan dengan jelas di mana-mana sekalipun bahawa defendan pertama telah melakukan kemungkiran terma penting kontrak apabila gagal membina jalan akses dari Jalan Dato' Dalam. Apapun, dilihat secara keseluruhan, dan mengambilkira jawapan, pliding tersebut telah mendedahkan satu kausa tindakan di dalam kontrak berkaitan kegagalan defendan pertama menyediakan jalan akses tersebut. Oleh itu, Mahkamah Tinggi khilaf dalam membenarkan rayuan defendan pertama semata-mata atas alasan bahawa tuntutan plaintif-plaintif adalah berasaskan tort salah nyataan cuai dan bukannya kemungkiran kontrak.

(2) Terdapat bahan yang mencukupi untuk Mahkamah Sesyen membuat rumusan bahawa salah nyataan lisan sememangnya telah dibuat melalui agen-agen jualan dan kakitangan defendan pertama kepada plaintif-plaintif bahawa jalan akses dari Jalan Dato' Dalam akan dibina yang sekaligus melumpuhkan disclaimer pada brocer, dan bahawa plaintif-plaintif telah bergantung pada representasi ini sebelum menandatangani Perjanjian Jual Beli. Di atas fakta, hakim Mahkamah Sesyen

berhak sepenuhnya untuk merumuskan bahawa representasi telah mendorong plaintif-plaintif untuk memasuki Perjanjian Jual Beli. Representasi sedemikian, atas prinsip yang dipakai oleh Salah Abas HMP di dalam *Tan Chong & Sons Motor Co Sdn Bhd v. Alan Mcknight*, adalah satu waranti "yang terasing dari kontrak utama", iaitu suatu waranti kolateral kepada Perjanjian Jual Beli.

(3) Walaupun tuntutan plaintif-plaintif nampaknya diperihalkan secara tidak teratur sebagai tuntutan untuk "lebihan bayaran", apa yang dituntut adalah perbezaan nilai antara satu unit pejabat yang mempunyai jalan akses kepadanya dengan unit yang tidak mempunyai akses sedemikian. Dalam ketiadaan lain-lain keterangan dari defendan pertama, keterangan penilai berdaftar yang dipanggil oleh plaintif-plaintif menilai perbezaan harga pasaran kedua-dua unit (dengan dan tanpa jalan akses) sebanyak RM201,000 harus diterima sebagai mewakili kerugian yang dialami oleh plaintif-plaintif.

Case(s) referred to:
Dick Bently v. Harold Smith Motors [1965] 2 All ER 65 ***(refd)***
Tan Chong & Sons Motor Co Sdn Bhd v. Alan Mcknight [1983] 1 CLJ 77; [1983] CLJ (Rep) 394 FC ***(refd)***

For the plaintiffs - Dato' Cyrus Das (RK Menon with him); M/s RK Menon
For the respondents - Gobind Singh Deo; M/s Gobind Singh Deo

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Kang Hwee Gee JCA:

[1] This is the 1st defendant's appeal which arose from a suit commenced by the plaintiffs at the Sessions Court wherein judgment was entered against the 1st defendant developer.

[2] The plaintiffs' claim at the Sessions Court was for loss arising from the sale and purchase of two office units in a complex to be built by the 1st defendant called Menara TJB, Johor Bahru *vide* the two Sale and Purchase Agreements dated 1 October 1996 and 8 October 1996.

[3] Essentially, the plaintiffs' claim is based on the averment that they had before entering into the Sale and Purchase Agreement relied on the brochure issued by the 1st defendant which showed that the complex Menara TJB when completed would be served by two access roads and also on the oral representation of the 1st defendant that both the access roads would be constructed and completed by the 1st defendant. The plaintiffs contend that they required the office for their law practice and were well aware of the fact that the area on which the complex was to be built was flood prone, and that the construction of the access road to the complex from Jalan Dato' Dalam which was on high ground was necessary in order to allow access to the complex in times of flood.

[4] When the complex was completed and the office units delivered to the plaintiffs no such access road from Jalan Dato' Dalam was constructed.

[5] The 1st defendant denied that the building of the access road from Jalan Dato' Dalam to the complex was ever a term of the contract. According to the evidence of its director Chan Kok Wah (DW1), the brochure relied upon by the plaintiffs was only intended to give "a general view" of Menara TJB and not intended to be a term of the Sale and Purchase Agreement which the parties later signed. In fact the brochure contained a disclaimer to say that all the drawings and pictures contained in the brochure were only artist's impression and that all the information and specifications contained therein are subject to change and should not be taken as an offer or a term of the contract.

[6] The 1st plaintiff testified that upon being told by a fellow lawyer Balarajah a/l Subramaniam (PW2) of the availability of office units to be developed for sale by the 1st defendant he went over to the 1st defendant's office to enquire about the units. He was assured by a staff of the 1st defendant that the access road from Jalan Dato' Dalam would be built as the other access road from Jalan Ayer Molek was prone to flooding. When he returned to his office he discussed the matter with his partner the 2nd plaintiff. They then rang up the 1st defendant's Sales Agent Param & Associates to make further enquiries. A person from the agency came over to their office and assured them that the access road would be built. They decided to purchase two units (the subject of the present claim). They then issued a cheque dated 12 August

1996 for a sum of RM50,479.50 to the 1st defendant as part payment of the 10% purchase price for the two units. On 4 September 1996 they received from the 1st defendant two sets of the Sale and Purchase Agreement and Deed of Mutual Covenant. They returned the two sets of the document duly signed together with a cheque of RM50,499.40 being the balance of the 10% deposit required under the agreement.

[7] The lawyer Balarajah (PW2) gave evidence confirming that he had informed the 1st plaintiff of the units offered for sale by the 1st defendant. He had bought a unit himself. Before deciding to buy the unit and before signing the Sale and Purchase Agreement he had at the 1st defendant's office met Belinda Kuo the 1st defendant's Marketing Executive and Chan Kok Wah the 1st defendant's Assistant Managing Director who showed him the brochure and model of the building and telling him not to worry about the flood as the access road to the complex from Jalan Dato' Dalam would be built.

[8] The Sessions Court accepted the evidence of the plaintiffs and found that the representation had indeed been made that the access road would be built in spite of the disclaimer in the brochure.

[9] The High Court however allowed the defendants' appeal. It set aside the judgment of the Sessions Court on the ground that the Sessions Judge had failed to judicially appreciate the case before him having judged the plaintiffs' claim based on breach of contract under the Sale and Purchase Agreement when their pleaded case was specifically founded on the tort of negligent misrepresentation.

[10] We find the plaintiffs' pleading most unsatisfactory in so far as it purports to set out a claim on breach of contract. Nowhere was it pleaded in clear terms that the 1st defendant had committed a breach of an essential term of the contract in failing to build the access road from Jalan Dato' Dalam. Nevertheless, we agree with the plaintiffs' submission that considered in its entirety taking into consideration the reply, the pleading does disclose a cause of action in breach of contract with respect to the 1st defendant's failure to provide the access road. The High Court was therefore wrong in allowing the 1st defendant's appeal only on the ground that the plaintiffs' claim was founded on the tort of negligent misrepresentation and not on breach of contract.

[11] There was enough material for the Sessions Court to find as it did that the oral representation had indeed been made through the sales agent and staff of the 1st defendant to the plaintiffs that an access road from Jalan Dato' Dalam would be built to override the disclaimer on the brochure and that the plaintiffs had relied on this representation before they signed the Sale and Purchase Agreement. The Sessions Court Judge was perfectly entitled to accept the evidence of the plaintiffs over the denial of the 1st defendant's assistant managing director that such representation had been made given that it was consistent with a similar representation made to the earlier purchaser Balarajah who bought a unit, and to conclude that the representation had induced the plaintiffs to enter into the Sale and Purchase Agreement. We accept the plaintiffs' submission that the representation constitutes a warranty "external to the main contract" that is to say a warranty collateral to the Sale and Purchase Agreement on the principle alluded to by Salleh Abbas FCJ in *Tan Chong & Sons Motor Co Sdn Bhd v. Alan Mcknight* [1983] 1 MLJ 220 approving the following passage from Lord Denning in *Dick Bently v. Harold Smith Motors* [1965] 2 All ER 65 at 67:

> ... it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

[12] Although the plaintiffs' claim appears to be inappropriately described as recovery of "overpayment", it is plain that what they are actually claiming was for the loss arising from the difference in value between an office unit with the additional access road against an office unit without the additional access road.

[13] In the absence of any other evidence emanating from the 1st defendant, the evidence of the registered valuer Tan Beng Sooi (PW3) called by the plaintiffs who assessed that the difference between the market value of the two units purchased by the plaintiffs with no access road from Jalan Dato' Dalam against the market value of the same units with the access road at RM201,000 should be accepted as representing the loss incurred by the plaintiffs.

[14] The plaintiffs' appeal is allowed with costs. The order of the High Court is set aside. The order of the Sessions Court is affirmed.

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